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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF GUAM

29 JULIE BABAUTA SANTOS, et. al.,
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FELIX P. CAMACHO, etc., et. al.
Respondents.

FILED
DISTRICT COURT OF GUAM

SEP - 6 2007 hba

JEANNE G. QUINATA
Clerk of Court

CIVIL CASE NO. 04-00006
(Consolidated with Civil Case Nos.
04-00038 and 04-00049)

**RESPONSE TO SEPTEMBER 5, 2007
ORDER TO SHOW CAUSE**

ORIGINAL

1 This response is filed to the Court's September 5, 2007 Order to Show Cause as to why
2 publication of the new hearing date had yet to occur and why sanctions should not issue.

3 As the Court knows, this has been a high profile case and the Governor and counsel have
4 made every effort to provide notice to class members, including through individualized notice to
5 the class and publication of the class notice twice a week for four weeks (when, if the Court looks
6 at the cases cited in the Governor's September 5 brief, notice by publication is often only once or
7 twice, total). *E.g. White v. National Football League*, 822 F. Supp. 1389, 1400 (D. Minn. 1993)
8 (publication only occurred once, on March 12, 1993); *see also Bynum v. Govt. of Dist. of*
9 *Columbia*, 384 F. Supp. 2d 342, 353-54 (D.D.C. 2005) (ordering notice twice a week for two
10 weeks). Indeed, as the Court also knows, when there was a question regarding notice of early
11 payments to persons subject to offsets, the Governor went back to this Court in March 2007 to
12 secure permission to provide additional notice and explanation to members of the Class. (*See*
13 *Docket No. 400*). In other words, the issue of notice is a concern that has always been important
14 to the Governor and his counsel and they have always tried to insure that such notice occurred.

15 This then leads to the question of the Court's June 26, 2007 Order. That Order required
16 publication of the new hearing date on any two calendar weeks, and publication on the internet.
17 The Order did not specify when such publication had to occur, and so counsel for the Governor
18 (who certainly takes responsibility if they misunderstood the Court's intent) simply set out to try
19 to determine what type of notice they thought would be most reasonably calculated to provide
20 effective notice to the class.

21 Counsel judged that notice for the two weeks before the hearing would be most effective.
22 The reasoning was as follows. First, by the time the June 26 Order issued, the opt-out dates and
23 objections dates under the Settlement had already passed. This seemed significant to counsel
24 because it seemed to mean there was no reason to give notice well in advance of the hearing as
25 there was no further decision to be made by class members except whether or not to appear at the
26 hearing. Second, there have been multiple settlements and notices of this action, and hearing date
27 changes. If notice was provided well in advance, there was a risk that the Class might just
28 conclude that this was the latest update until things changed again. Third, counsel was concerned

1 that if notice was published well in advance of the hearing, there was a risk that the hearing would
2 be forgotten by Class Members by the time it arrived. Fourth, there was always the risk that the
3 hearing might get postponed again; if that occurred, there was a risk of confusion to the class if a
4 notice was already posted on the internet and in the papers, especially in the context where there
5 had been prior notice and prior hearing dates that had already changed.

6 Thus, in counsel's view, the most effective notice would be immediately before the
7 hearing for the following reasons: (1) There was no reason for notice well in advance as class
8 members had no decision left except whether to attend the hearing; (2) repeated notice in the two
9 weeks before the hearing ensured that the hearing would not be forgotten; (3) repeated notice in
10 the two weeks before the hearing ensured that the Class would not dismiss it as only a possibility,
11 but would know the date was set; and (4) if there was any further change in the date, no further
12 change in the notice to the Class that might cause confusion would occur.

13 In reviewing that June 26 Order then, and in re-reviewing that Order now, counsel does
14 not believe that the decision to publish the notice in the two weeks prior to the hearing and to
15 place that notice on the internet at that time is contrary to the Court's Order. The Court's Order
16 did not require publication on a given date, or contain other wording (such as that publication had
17 to occur "immediately") that would have indicated that notice had to be published or posted at an
18 earlier time. Counsel states this very respectfully, because counsel now realizes from the Court's
19 Order to Show Cause that the Court may have had other intentions. But counsel does not believe
20 that the decision made to publish in the two weeks leading up to the hearing was contrary to the
21 June 26 Order as written, and therefore does not believe that counsel (who made the decision) or
22 the Governor are guilty of contempt. At most, they have misunderstood or misapplied the Court's
23 Order in a manner that was consistent with the Order as written and that they believe caused no
24 harm to the Class.¹

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26
27 ¹ The focus of this brief is to promptly address the Court's inquiry. But, because the
28 Court has stated it was considering sanctions, it is respectfully noted that civil sanctions for
violation of a court order require a clear violation of that order, and respectfully no such violation

1 Indeed, it is worth noting that the law is fairly clear that the Class, once informed of the
2 fairness hearing in the class action notice, does not actually have to be told of the new hearing
3 date (because, having been informed of the proceedings, class members could then follow the
4 proceedings and appear if desired). For example, in *In re Prudential Ins. Co. of America Sales*
5 *Practices Litigation*, 177 F.R.D. 216, 232 (D.N.J. 1997), the court approved a class notice that
6 actually stated the fairness hearing could be moved without notice. The court did then later move
7 the hearing, and nonetheless (as non-required additional step) directed notice be given to *class*
8 *members who had indicated an intent to appear*. *Id.* at 232 & n. 13. But no further notice was
9 given to class members who had not indicated an intent to appear.

10 Here, the Settlement and Class Notice required Class Members to submit written
11 objections or comments stating their desire to appear by June 22, 2007:

12 **1. Written Objections or Comments.** If you have not requested exclusion
13 from the Class, you, or an attorney retained by you, may file with the Office of the
14 Clerk of Court, District Court of Guam, 520 West Soledad Avenue, Hagåtña, GU

15 occurred as notice is being published consistent with the terms of the Order. With regard to
16 sanctions, this case law can be summarized as follows:

17 In analyzing a contempt order, we recognize that such an order is a "potent
18 weapon," *International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n*,
19 389 U.S. 64, 76, 88 S.Ct. 201, 208, 19 L.Ed.2d 236 (1967), to which courts should
20 not resort "where there is a fair ground of doubt as to the wrongfulness of the
21 defendant's conduct," *California Artificial Stone Paving Co. v. Molitor*, 113 U.S.
22 609, 618, 5 S.Ct. 618, 622, 28 L.Ed. 1106 (1885). A contempt order is warranted
23 only where the moving party establishes by clear and convincing evidence that the
24 alleged contemnor violated the district court's edict. *See Hart Schaffner & Marx v.*
25 *Alexander's Dep't Stores, Inc.*, 341 F.2d 101, 102 (2d Cir.1965) (per curiam). More
26 specifically, a movant must establish that (1) the order the contemnor failed to
27 comply with is clear and unambiguous, (2) the proof of noncompliance is clear and
28 convincing, and (3) the contemnor has not diligently attempted to comply in a
reasonable manner. *See New York State Nat'l Org. for Women v. Terry*, 886 F.2d
1339, 1351 (2d Cir.1989), *cert. denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed.2d
532 (1990). A clear and unambiguous order is one that leaves "no uncertainty in
the minds of those to whom it is addressed," *Hess v. New Jersey Transit Rail*
Operations, Inc., 846 F.2d 114, 116 (2d Cir.1988), who "must be able to ascertain
from the four corners of the order precisely what acts are forbidden," *see Drywall*
Tapers, Local 1974 v. Local 530, Operative Plasterers Int'l Ass'n, 889 F.2d 389,
395 (2d Cir.1989), *cert. denied*, 494 U.S. 1030, 110 S.Ct. 1478, 108 L.Ed.2d 615
(1990).

King v. Allied Vision, Ltd., 65 F.3d 1051, 1058 (2d Cir. 1995) (emphasis added).

1 96910 a statement objecting to or commenting on the settlement and/or the motion
2 for attorneys' fees on or before June 22, 2007. Such statement must also be served
3 upon all counsel in the litigation, who are: (1) Phillips & Bordallo, P.C., 410 West
4 O'Brien Drive, Suite 102, Hagåtña, Guam 96910; (2) Lujan Aguigui & Perez LLP,
5 300 Pacific News Building, Hagåtña, Guam 96910; (3) Shannon Taitano, Esq.,
6 Legal Counsel, Office of the Governor, Ricardo J. Bordallo Governor's Complex,
7 Adelup, P.O. Box 2950, Hagåtña, GU 96932 (4) Calvo & Clark, LLP, 655 South
8 Marine Corps Drive, Suite 202, Tamuning, Guam 96913; and (5) Mantanona Law
9 Office, Suite 601B, GCIC Bldg., 414 W Soledad Ave., Hagåtña, Guam 96910.

10 **2. Presentation of Objections and Supporting Comments at Fairness**
11 **Hearing.** You may also attend the Fairness Hearing, either personally or through
12 an attorney retained by you, at your own expense, and ask to be heard by the Court
13 on your comments or objections. If you wish to do so, you must submit your
14 objections or comments in writing in compliance with section VIII(B)(1)
15 above and include in your comments a statement that you intend to appear
16 and wish to attend the Fairness Hearing.

17 (Notice § VIII(B) (emphasis added); *see also* Docket 389 at 2:25-3:2 (Court Order setting this
18 schedule and specifically stating that requests to appear were due by June 22, 2007)).

19 Other than the *Simpao* Objectors, no other Class Members asked to participate by June 22,
20 2007. Accordingly, although the Governor would encourage class participation, as a legal matter,
21 by the time of the June 26 Order, Class Members had already waived the right to appear at the
22 hearing under the Court's scheduling Order. (*See* Docket 389 at 2:25-3:2). This Court therefore
23 could have, consistent with class action law, directed that notice only be provided to the Class
24 members who had appeared (the *Simpao* Objectors), just as occurred in *In re Prudential Ins. Co.*

25 Of course, this Court required additional notice in the June 26 Order, and the Governor
26 and counsel do not object to that, and in fact are intending to give notice consistent with that
27 Order. Thus, *if* counsel and the Governor have misunderstood the Court's Order, or if the Court
28 believes there is now a defect in notice,² then the Governor and counsel respectfully request that

29 ² Again, counsel has never seen any case law to that affect, otherwise they would have
30 handled this differently. Indeed, it is notable that Objectors' motion that raised the issue of
31 compliance with the Court's June 26 Order never said that notice in the two weeks before the
32 hearing was ineffective, they just asked the Court to order such notice (hence the Governor's
33 response that this was already the Governor's intention).

1 the Court reschedule the hearing as soon as possible and directly specifically when the Court
2 wishes the notice of a new hearing date be published.³

3 Counsel does not like to impose on the Court in this manner by asking for direction so
4 quickly, but notice is scheduled to be published in the PDN starting this Sunday, September 9,
5 and counsel would not want that notice to be published if the Court intends to move the date
6 because counsel does not want to face any accusations that the Class was confused by this
7 sequence of events. Thus, if possible, they would ask for direction from the Court prior to
8 September 9 as to whether to halt the currently scheduled publication.

9 CONCLUSION

10 The Governor and counsel apologize if they misunderstood or misapplied the Court's June
11 26 Order. They believe they have an established track record in this case of obeying the Court's
12 Orders and doing everything they can to ensure this Settlement succeeds, including supplying
13 notice to the Class that exceeds the federal standard set by the Ninth Circuit. They also believe
14 that they selected the means of supplying notice most reasonably calculated under the
15 circumstances to provide notice to the Class. They do not believe that their actions violated the
16 Court's Order of June 26, and therefore most respectfully do not believe they should be subject to
17 sanctions. However, they also believe that it is critical in this instance to ensure not only that they
18 believe that the form of notice provided is adequate, but that the Court also shares that view. So
19 if counsel and the Governor have misunderstood or misapplied the Court's prior Order, they
20 would ask that the hearing be immediately rescheduled, and that the Court specify the dates of
21 publication desired and it will be carried out. Further, because notice publication in the PDN is
22 scheduled to begin this Sunday, if the Court does intend to move the hearing, they most
23 respectfully ask that they be so notified by this Friday so that they can immediately contact the
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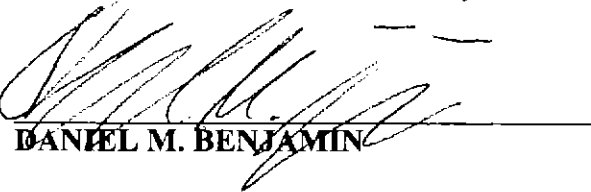
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26 ³ The Governor and counsel only mention the possibility of rescheduling reluctantly,
27 because they do not think there is any defect in notice here. However – and this is why counsel
28 and the Governor are responding to the Court's Order to Show cause within hours of receipt of
the Order to Show Cause this morning and even sooner than required by the Court in the Order to
Show Cause – what is critical here is that the Class receive adequate notice *and* that the Court be
satisfied that such notice is adequate.

1 PDN and halt publication. Again, however, they do believe that the notice of the upcoming
2 hearing that they intend to presently supply barring further direction from the Court is legally
3 sufficient and correct.

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5 Dated this 6th day of September, 2007.

6 OFFICE OF THE GOVERNOR OF GUAM
7 CALVO & CLARK, LLP
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9 *Attorneys for the Government of Guam*
10 *and Felix P. Camacho, Governor of Guam*

11 By:

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